Supreme Court, U.S.
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No. 93-454

In The

Supreme Court of the United States

October Term, 1993

LOUISIANA-PACIFIC CORPORATION,

Petitioner,

vs.

BURTON BAKER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

REPLY BRIEF FOR PETITIONER

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AUTHORITY FOR REPLY

Respondent Baker argues that one of the controlling authorities on whether Louisiana-Pacific (L-P) is entitled to notice and a hearing on its Motion to Recuse is Idaho Rules of Civil Procedure, Rule 7(b)(3). This argument was raised for the first time in the Respondent's Brief in Opposition to Writ of Certiorari. It was not raised in L-P's Petition for Writ of Certiorari, nor was it cited as an authority by the Idaho Supreme Court or raised by either party in any of the proceedings below. This reply brief is therefore submitted pursuant to U.S. Supreme Court Rule 15.6.

ARGUMENT

Respondent Baker's brief in opposition references "oral argument" and an "oral hearing" (Brief in Opposition to Petition for Writ of Certiorari, at IV, p. 11), and then refers this Court for the first time in this proceeding to Idaho Rules of Civil Procedure, Rule 7(b)(3) as support for his argument that no hearing was required. Rule 7(b)(3) provides:

> **Briefs and arguments on motions.** - It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether the party desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion, and does not file a brief within 14 days, the court may deny such motion without notice if the court deems the motion has no merit. If argument has been requested on any motion, the court may, in its discretion, deny oral argument by counsel by written or oral

> notice to all counsel before the day of the hearing, and the court may limit oral argument at any time.

The Respondent's argument that Rule 7(b)(3) governs the issue of the denial of L-P's right to notice and hearing is an erroneous statement of Idaho law.

The Respondent does acknowledge that Idaho Rules of Civil Procedure, Rule 40(d)(2)(B) is the rule applicable to Motions for Disqualification. Rule 40(d)(2)(B) provides:

> Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

The Respondent, however, argues that a judge whose disqualification is sought, on the grounds of bias and prejudice, should first determine whether notice and hearing are required, and that the judge is to make this determination "in the manner prescribed by these rules for motions." I.R.C.P. 40(d)(2)(B). According to the Respondent, Idaho Rules of Civil Procedure, Rule 7(b)(3) describes how to determine *whether* notice and hearing are *required*. This prepositional phrase, however, tells us *how* the required notice shall be given and the hearing held, and not *whether* they are required.

The Respondent's argument flies in the face of statutory construction, proper English grammar, and due process. The Respondent reads the prepositional phrase "in the manner prescribed by these rules for motions" independently from the rest of the sentence. General rules of statutory construction provide that statutes and rules are read in their entirety, and may not be dissected to create new meaning. Proper English grammar also militates against the Respondent's reading of Rule 40(d)(2)(B). The prepositional phrase "in the manner prescribed by these rules for motions" modifies the prepositional phrase immediately preceding it "upon notice and hearing". This prepositional phrase in turn modifies the dependant clause "the presiding judge or magistrate sought to be disqualified *shall* grant or deny the motion for disqualification". (Emphasis added). Read properly then, the phrase "in a manner prescribed by these rules" means that the *notice* and *hearing* shall be provided and held in accordance to the Idaho Rules of Civil Procedure.

Due process also mandates that notice and hearing be provided. Rule 40(d)(2) was adopted by the Idaho Supreme Court on November 1, 1987. Prior to this adoption, disqualification was done pursuant to Idaho Code §R1-1801 which provided:

> Upon the filing of an affidavit of prejudice . . . the presiding judge is automatically disqualified. *The filing of such an affidavit is sufficient to disqualify the judge without any hearing on his truth or falsity* and regardless of whether he is actually prejudiced as a matter of fact.

(Emphasis added). *State v. Ash,* 94 Idaho 542, 493 P.2d 701, 704 (1972). Rule 40(d)(2) provides that, rather than the prior practice of automatic disqualification upon the filing of an affidavit, before a decision is made on disqualification, notice *shall* be given and a

hearing held to determine the truth or falsity of the allegations contained in the complaint and to make and enter a determination of a finding of fact as to bias and prejudice. The hearing on the truth or falsity of the affidavit of prejudice that is not required under the prior law (see *State v. Ash, supra.*), is exactly what is required under the new rule. In other words, a trade-off occurred and automatic disqualification was eliminated in favor of disqualification only after notice and a hearing into the truth or falsity of the affidavit of prejudice.

Finally, even if Respondent Baker's arguments are accepted and Rule 7(b)(3) is deemed to be controlling, by this Rule's expressed terms, a motion can be denied only without notice if the Court deems the motion has no merit. As a matter of law, a motion to disqualify meets its prima facie burden and has merit when supported by an affidavit of prejudice, as was done in this case. Certainly, if the old statutory law provided that the mere filing of an affidavit of prejudice was sufficient to *automatically* disqualify the judge, the filing of an affidavit of prejudice, under the new rule, Rule 40 (d)(2)(B), is sufficient to meet a prima facie claim of bias and prejudice. As a matter of law, L-P's motion cannot be without merit. In fact, L-P's Motion to Recuse was not found to be without merit; it was merely denied. We do not know if the Idaho Supreme Court found L-P's motion to have merit, but not dispositive, as the Court was silent on the basis for its ruling.

As the Court in *Wolff v. McDonnell*, 418 U.S. 539, 550, stated: "[t]he touchstone of due process is protection of the individual against arbitrary action of government." The scenario suggested by the Respondent is precisely the type of arbitrary governmental action that due process was intended to prevent. If the Respondent's position is accepted, the judiciary would condone a judge who is faced with a motion to recuse supported by an affidavit of prejudice, denying the motion without a stated basis, comment, or any acknowledgement whatsoever. Such a situation

was faced by L-P in the present case. How could any moving party react in any way other than with shock, disbelief, and disillusionment. Challenging a judge's impartiality is done only after rigorous consideration. Having made the decision to so challenge, and then receiving virtually no response, a party justifiably would be left with the belief that its concern about such a fundamental right had not been seriously considered, and that it had not received justice.

Respectfully submitted,

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